U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 September 2003

BALCA Case Nos.: 2003-INA-41, 2003-INA-53, 2003-INA-54, 2003-INA-55, 2003-INA-86
ETA Case Nos.: P2000-CA-09507673/ML, P2000-CA-09508765/ML, P2000-CA-09508766/ML, P2000-CA-09508767/ML, P2000-CA-09508774/ML

In the Matters of:

STAFFING SERVICES,
Employer,

on behalf of

JOSE MIRANDA-DUARTE,
LUZ PEREZ,
MARIA QUINTERO-PEREZ,
ZENAIDA MARTINEZ, and
JUAN RAMIRO ALVINEZ,
Aliens.

Appearance: Marisela Dangcil
For Employer and Alien

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Staffing Services ("Employer") filed applications for labor certification[1] on behalf

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files and

of five Aliens in 1999.[2] Employer sought to employ all five Aliens for the same position, "Shipping and Receiving Clerk." (AF 42). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

The CO issued a Notice of Findings on August 2, 2002, proposing to deny certification on the grounds that Employer's requirement of two years of experience in the job offered is unduly restrictive in violation of section 656.21(b)(2)(i)(A), that the Alien was hired without the two year experience requirement in violation of section 656.21(b)(5), and that Employer had failed to document a good faith recruitment effort in violation of sections 656.20(c)(8) and 656.21(b)(6). (AF 26-29). Specifically, the CO stated that Employer was notified by the Local Job Service that the Specific Vocational Preparation time for a Shipping and Receiving Clerk (DOT 22.387-050) is six months to one year. (AF 27). Employer responded to the Job Service with a description of duties similar to that already in box 13 of the ETA 750A. The CO concluded that since these duties are similar to those given in the DOT code assigned by the Job Service and Employer provided no alternative occupational title, the evidence was not convincing that the job requires more skill than that described in the DOT. To correct the deficiency, the CO directed Employer to either amend the restrictive requirement or justify the requirement based on business necessity. (AF 27). If Employer chose to amend the restrictive requirement, the CO required "two copies of an amendment letter bearing original signatures, your statement you are willing to retest the labor market, and your draft advertisement." (AF 27).

In regard to the Alien's qualifications for the job, the CO directed Employer to either "submit

---

any written arguments. 20 C.F.R. § 656.27(c).

[2] In this decision, "AF" refers specifically to Jose Miranda-Duarte Appeal File as representative of the Appeal File in all of the appeals. A virtually identical application was filed for all five applicants and the issues raised and dealt with by the CO (*i.e.*, NOF, FD) in each case are identical.

an amendment to the ETA750B signed by the alien showing the lacking experience, training and/or education" or amend the ETA750A to delete the requirement, or document infeasibility to hire workers with less training or experience than required by the job offer. The CO directed Employer to the instructions about amending the ETA750A under the unduly restrictive job requirement section if it chose to delete the requirement.

Finally, the CO proposed denial on the ground that Employer had not demonstrated a good faith effort to recruit U.S. workers in violation of section 656.21(b)(2)(ii). Specifically, the CO observed that 50 resumes had been sent to Employer, and there was insufficient evidence of Employer's effort to contact the U.S. applicants in a timely matter, if at all. (AF 28). The CO stated that positive contact efforts include both attempts in writing, supported by dated return receipts and by telephone, supported by phone bills. The CO also questioned whether any contacts were made in a timely manner. The CO directed Employer to correct this deficiency by documenting its attempts to contact these applicants in a timely manner. (AF 28).

In a rebuttal dated August 29, 2002 (AF 11- 25), Employer asserted that, although that it needed careful workers and this was why the two year requirement was necessary, it was willing to retest the labor market. (AF 17-18). However, Employer indicated that it wanted to explain its position as to the business necessity of the requirement, and only then, if the CO was not convinced, provide an amended ETA 750A, a letter attesting to a willingness to readvertise, and a draft advertisement. (AF 17).

As to the Alien's experience, Employer asserted that the Alien worked as a Shipping and Receiving Clerk from June 1988 to September 1991 in Mexico, and stated that it would provide an amended ETA750B if this discussion was acceptable, or delete the requirement the Alien did not possess at the time of hire. (AF 18).

Employer responded to the CO's finding of insufficient recruitment by providing a list of each applicant and the efforts that were made to schedule an interview and the results of those efforts. (AF

18- 22). Attached to the rebuttal is a chart evidently used by Employer in making telephone contacts of applicants. (AF 23-25).

On October 30, 2002, the CO issued a Final Determination denying certification. (AF 9 - 10). Employer requested review in November, 2002. (AF 1). Employer filed an appellate brief, received by the Board on February 4, 2003. Attached to the brief is a November 15, 2002 letter stating that Employer is willing to amend the ETA 750A to state a one year experience requirement, and attesting to willingness to readvertise with the reduced requirement. Also attached is a draft advertisement, and a November 15, 2002 letter stating that Employer was amending the ETA 750B to show Employer's previous experience as a shipping and receiving clerk. This letter bears the Alien's signature.

DISCUSSION

Unduly restrictive job requirement

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates*, 1987-INA-569 (Jan 13, 1989) (*en banc*). The requirements for a job opportunity, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States and shall be those defined in the DOT. *See* 656.21(b)(2)(i).

Employer argued that the job opportunity requires two years of experience because of the level of responsibility of the Shipping and Receiving Clerk. (AF 17). However, Employer's job description (AF 42) states fewer duties to be performed than the DOT job description for Shipping and Receiving Clerk. (DOT Code 222.387-050). The DOT shows an SVP level that would only support a six month to one year experience requirement. Therefore, Employer's level of responsibility

argument does not have any persuasive weight.

Employer's options were to modify its requirements to reduce the experience requirement, or to justify the requirement by showing business necessity. To show business necessity, an employer must document that "the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties." *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*) (AF 28). In its rebuttal submission, Employer merely argued that the level of responsibility for a Shipping Clerk and consumer satisfaction demand a higher experience requirement. (AF 17). Employer provided no further documentation to support this argument. In light of Employer's burden of proof and the lack of supporting documentation submitted in support of its argument, we find that Employer has not shown the business necessity of the experience requirement.

Employer's rebuttal indicated a willingness to readvertise with a reduced experience requirement. Employer, however, did not follow the CO's explicit instructions to provide a signed, amended ETA 750A, draft advertisement, and letter stating willing to retest the job market, but only offered to provide such if the business necessity justification was not accepted. In *Ronald J. O'Mara*, 1996-INA-113 (Dec. 11, 1997)(*en banc*), the Board held that an employer may attempt to establish the business necessity for a job requirement and, if unsuccessful, readvertise the position if the employer has unequivocally agreed to readvertise in accordance with the requirements set forth by the CO in the NOF. In this case, the CO's directions to provide a signed, amended ETA 750A, draft advertisement and letter stating willingness to readvertise, were reasonable requirements, as the CO was entitled to know under what terms Employer proposed to readvertise if the business necessity argument was not accepted. Employer's failure to provide the required items in the rebuttal renders its offer to readvertise insufficient under the *O'Mara* criteria. Employer's attachments to the Appellate Brief are tantamount to an untimely attempt to correct the deficient rebuttal.

Alien's experience

In the rebuttal letter, Employer provided a brief description of the Alien's work experience in Mexico, but did not provide an amended ETA 750 B signed by the Alien as directed by the CO in the NOF. Rather, it only made the statement that such an amended ETA 750B would be provided if the CO accepted the assertion about the Alien's experience. Employer also offered to delete the requirement the Alien did not possess at the time of hire.

Again, Employer failed to follow the CO's clear directions. Employer did not provide an amended ETA 750B, did not provide any statement of the Alien's experience signed by the Alien, and did not clarify what it meant by willing to delete the requirement not possessed by the Alien at the time of hire. We note that the ETA750 B as originally submitted showed no prior experience by the Alien prior to hire by Employer. Employer's provision of a letter signed by the Alien as a attachment to the Appellate Brief is also tantamount to an untimely attempt to correct the deficient rebuttal.

Good faith recruitment

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent.*, Inc., 1987-INA-607 (Oct. 27, 1988). Further, section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job related reasons. Therefore, actions by the employer which indicate a lack of a good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by 656.1. The burden is on the employer to establish that he engaged in a good faith recruitment effort. A recruitment report must describe the details of the employer's recruitment efforts to be sufficient. *Yaron Development Co., Inc.*, 1989-INA-178 (Apr. 19, 1991) (*en banc*).

In rebuttal, Employer set forth a description of its contacts of each of the fifty U.S. applicants and its reasons for rejecting each one. Some, Employer asserted, failed to show up for the scheduled

interviews or failed to return Employer's phone calls. The remainder were no longer interested in the position or deemed unqualified by Employer for not possessing the required two years of experience. (AF 18-25). Employer, however, provided no documentation to substantiate its claims other than the telephone chart. The CO expressly pointed out in the NOF that Employer's proof failed insofar as no supporting documentation, such as evidence of mailing of recruitment letters or telephone billing records, had been provided. Employer's rebuttal did not include any such documentation or even address the question of whether such evidence was available. The chart, although providing some details about the contact of applicants, does not indicate how the contacts transpired (*e.g.*, whether Employer merely left a message on an answering machine or actually spoke to the applicant). Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001) (*en banc*). Because Employer has not provided any independent documentation to establish its contacts with the U.S. applicants, and relies only on its own general, undocumented assertions, we find that the CO properly found that Employer had not met its burden of establishing a good faith recruitment effort.

ORDER

Accordingly, the CO's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when

the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C. 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.